1986

Gilbert R. Lamb v. Jordan School District : Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

GILBERT R. LAMB,

Applicant/Respondent,

vs.

JORDAN SCHOOL DISTRICT (self-insured),

Defendant/Respondent,

WORKERS COMPENSATION FUND OF UTAH (formerly State Insurance Fund),

Defendant/Appellant,

SECOND INJURY FUND,

Defendant/Respondent.

No. 860272-CA

Priority No. 6

BRIEF OF APPELLANT

Petition for Review

The Industrial Commission of Utah

Elliot K. Morris
P.O. Box 45420
Salt Lake City, Utah
84145-0420
Attorney for Defendant/
Appellant

Michael J. Mazuran
#9 Exchange Place, Suite 100
Salt Lake City, Utah 84111
Attorney for Respondent,
Gilbert R. Lamb

Robert A. Burton
Sixth Floor Boston Bldg.
Salt Lake City, Utah 84111
Attorney for Respondent, Jordan School District

Erie V. Boorman
Administrator, Second Injury Fund
Industrial Commission of Utah
160 East 300 South
Salt Lake City, Utah 84145-0580

David Wilkinson
Attorney General, State of Utah
State Capitol
Salt Lake City, Utah 84114
Attorney for Respondent, Second Injury Fund

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P.O. Box 45420
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#9 Exchange Place, Suite 100
Salt Lake City, Utah 84111
Attorney for Respondent,
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Robert A. Burton
Sixth Floor Boston Bldg.
Salt Lake City, Utah 84111
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Industrial Commission of Utah
160 East 300 South
Salt Lake City, Utah 84145-0580

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Attorney General, State of Utah
State Capitol
Salt Lake City, Utah 84114
Attorney for Respondent, Second Injury Fund

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STATEMENT OF JURISDICTION AND PROCEEDINGS BELOW

The jurisdiction of the Court of Appeals over this petition for review of an order of the Industrial Commission of Utah is conferred by Utah Code Annotated, Section 35-1-83, as amended, 1986. This petition is brought to review the order of the Indusrial Commission entered in this matter on October 23, 1986 which awarded certain workers compensation benefits to the respondent, Gilbert Lamb pursuant to Utah Code Annotated, Section 35-1-1 et seq. and assessed a portion of the liability for those benefits to the appellant, Workers Compensation Fund of Utah.

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Where the respondent, Gilbert Lamb sustained a permanent partial disability through a series of industrial accidents, did the Industrial Commission err by apportioning liability for workers compensation benefits for that disability between the respondent, Jordan School District, the injured worker's self-insured employer at the time of the last accident and the appellant, Workers Compensation Fund of Utah, his employer's insurance carrier at the time of the previous accidents?

2. Even if it was proper for the Industrial Commission to apportion benefits for the injured worker's permanent disability between the Jordan School District and the Workers Compensation Fund of Utah, did the Commission err in apportioning liability between these carriers for the injured worker's temporary total disability following the last industrial accident?

3. Even if it was proper for the Industrial Commission to apportion liability for the injured worker's temporary total disability following the last industrial accident between the Jordan School District and the Workers Compensation Fund of Utah, did the Commission err in requiring the Workers Compensation Fund of Utah to pay its share of the liability at the compensation rate attributable to the last accident and by not requiring the Second Injury Fund to share liability with the Workers Compensation Fund for this compensation?

DETERMINATIVE STATUTORY PROVISIONS

The appellant beleives that the following statutory provisions are either fundemental or important in the determination of the issues presented for review herein:

Utah Code Annotated, Sections 35-1-45, 46, 65, 66, and 69, (See Addendum, items 1 - 5.)

STATEMENT OF THE CASE

Nature of the Case

This case is a petition for review of an order of the Industrial Commission of Utah holding the appellant Workers Compensation Fund of Utah liable for workers compensation disability benefits to the respondent Gilbert R. Lamb.

Course and Disposition in the Industrial Commission

On March 18, 1985 Gilbert R. Lamb filed an application for hearing with the Industrial Commission of Utah requesting adjudication of a claim for workers' compensation benefits arising out of an industrial accident occuring on December 5, 1984 while in the course of his employment with Jordan School District. (R-68.) In an amended answer to that application filed by the self-insured employer through their agent Smith Administrators, joinder of the Workers Compensation Fund of Utah (known at the time as the State Insurance Fund) was requested. (R-90.) On May 31, 1985 the Workers Compensation Fund of Utah was made a party to the proceedings through the

filing of three applications for hearing on claims arising out of industrial accidents pre-dating the December 5, 1984 accident. (R-6, 21, 41.)

On September 30, 1985, a hearing was held before Timothy C. Allen, an administrative law judge of the Industrial Commission. At the conclusion of the hearing, Judge Allen took the matter under advisement pending referral to a medical panel pursuant to Utah Code Annotated, Section 35-1-77. (R-143.) On August 20, 1986, Judge Allen issued his Findings of Fact, Conclusions of Law, and Order which awarded permanent partial disability benefits to Mr. Lamb, liability for which was apportioned among the Second Injury Fund, the Workers Compensation Fund of Utah, and the self-insured Jordan School District relative to the findings of the medical panel with respect to the underlying causes of the permanent partial impairment of the injured worker. (R 209-216.)

On August 29, 1986, the Workers Compensation Fund of Utah filed a Motion for Review pursuant to Utah Code Annotated, Section 35-1-82.53, arguing that the administrative law judge had no statutory authority to apportion disability compensation between the Workers Compensation Fund and the self-insured employer. (R 217-218.)

On September 3, 1986 Jordan School District also filed a Motion for Review contending that since permanent partial disability compensation had been apportioned according to the medical panel's assessment of the causation of Mr. Lamb's

permanent physical impairment, the judge should have also so apportioned the temporary total disability compensation accruing after the December 5, 1984 accident. (R 249-250.)

In an order dated October 23, 1986, the Industrial Commission denied the Workers Compensation Fund's Motion for Review and granted the Motion for Review of Jordan School District.

The Workers Compensation Fund of Utah filed a Petition for Writ of Review in the Utah Supreme Court on November 19, 1986 and entitled the action Workers Compensation Fund of Utah v. Industrial Commission of Utah, et al., Case No. 860590. The case was subsequently assigned to this Court and is entitled as set forth on the cover of this brief pursuant to Rule 27 of the Rules of the Utah Court of Appeals, 50A Utah Adv. Rep., January 13, 1987.

Statement of Facts

The facts surrounding the various injuries sustained by Gilbert Lamb are undisputed and are set forth in detail in the administrative law judge's Findings of Fact. (R 209-211.)

In approximately 1960 while in the employ of Central Electric in Santa Maria, California, the respondent Gilbert R. Lamb first injured his back. After brief medical treatment he had no further problems with his back until November 18, 1980. (R-210.)

On November 18, 1980 Mr. Lamb was working for Jordan School District as an electrician in their maintanence shop. (R 94.) On that day he went to the warehouse to find a motor and while looking on a lower shelf while in an awkward position, he twisted and injured his back. (R 95.) This injury did not result in any lost time from work and after brief medical treatment he had no further problems as a result of this incident. (R 96-97.)

Mr. Lamb continued to work for Jordan School District. On August 18, 1982 he sustained another on-the-job injury to his low back while attempting to climb out of a swimming pool he had been working in. (R 99-101.) The Workers Compensation Fund, the District's compensation insurance carrier at the time, paid Mr. Lamb's medical bills associated with this incident along with temporary total disability compensation for the time Mr. Lamb was off work. (R-27, 133.)

While still in the employ of Jordan School District, Mr. Lamb again injured his low back. This occured on June 24, 1984 when he slipped after jumping from one rooftop to another while carring a pipe or shaft. (R 108-109.) Mr. Lamb's medical bills were again paid for by the Workers Compensation Fund. (R 112-113, 32.) Mr. Lamb continued to work without lost time after this incident. (R-41.)

On December 5, 1984 while in the course of his employment with Jordon School District, Mr. Lamb slipped on ice covering

the parking lot at his workplace, and once again injured his low back. (R 114-115.) He attempted to return to work the following day but the pain was so severe he was unable to function and so he had to go home. (R 116-117.) Mr. Lamb remained unable to work as of January 31, 1985 when the adjusting company for Jordan School District, now self-insured, terminated his temporary total disability benefits. (R-211, 42, 86.) Mr. Lamb was thereafter treated by an orthopedic surgeon who performed low back surgery on him on March 14, 1985. (R-211, 124.) At the time of the Commission's hearing on September 30, 1985 Mr. Lamb had still not been able to return to work. (R-117.)

The medical panel report dated May 5, 1986 found that the surgery of March 14, 1985 was necessitated by conditions existing prior to 1980 and the combined effects of the accidents of August 10, 1982, June 14, 1984, and December 5, 1984. The panel further found that Mr. Lamb had a permanent partial impairment of 12.5% of the whole person from conditions existing prior to 1980. In addition, the panel concluded that the combined effects of the accident in 1982 and the two in 1984 had caused Mr. Lamb to sustain an additional 12.5% permanent impairment to the whole person. (R 199-204.) On the basis of this report, the administrative law judge made his findings and order. (R-212.)

SUMMARY OF ARGUMENTS

The Industrial Commission erred by ordering apportionment between Jordan School District and the Workers Compensation Fund of Utah of the permanent partial and temporary total disability compensation awarded to Gilbert Lamb. As clearly stated by the Utah Supreme Court, there is no authority under the law of this state for apportionment of workers' compensation disability benefits in multiple accident cases. The law requires the employer or insurance carrier at the time of the last accident to pay the compensation resulting from the combined injuries. If there is an apportionment remedy availabe to the last employer or carrier in a multiple accident case, it is to be found in Utah Code Annotated, Section 35-1-69 (1953, as amended) which provides for reinsurance by the Second Injury Fund for the effects of injuries existing prior to the last industrial injury.

Even if the Commission properly apportioned the permanent partial disability benefits, it exceeded its authority in apportioning the temporary total disability compensation accruing after the last accident between Jordan School District and the Workers Compensation Fund. Recent decisions of the Utah Supreme Court mandate that Utah Code Annotated, Section 35-1-69 (1953, as amended), be applied in this case so that the apportionment of disability and medical benefits from the last accident is soley between Jordan School District and the Second Injury Fund.

Finally, if the Commission can apportion liability for both temporary total and permanent partial disability compensation between the Workers Compensation Fund of Utah and Jordan School District, the Commission erred in failing to use the correct method of apportionment with the Second Injury Fund and in failing to make the Workers Compensation Fund's share of the temporary total disability compensation payable at the compensation rates in effect at the time of Mr. Lamb's August, 1982 and June, 1984 accidents. Utah Code Annotated, Section 35-1-65 (1953, as amended) requires that the weekly rate for temporary total disability compensation be based on the employee's average weekly wage and the state average weekly wage at the time of the injury for which the employer is liable.

ARGUMENT

POINT I

THE INDUSTRIAL COMMISSION EXCEEDED ITS AUTHORITY IN ORDERING APPORTIONMENT OF LIABILITY FOR GILBERT LAMB'S WORKERS COMPENSATION DISABILITY BENEFITS BETWEEN THE SELF-INSURED JORDAN SCHOOL DISTRICT AND THE WORKERS COMPENSATION FUND OF UTAH.

A. THE ISSUE OF THE LEGALITY OF APPORTIONMENT OF WORKERS COMPENSATION BENEFITS IN A MULTIPLE ACCIDENT CASE IS A QUESTION OF LAW REQUIRING THE APPELLATE COURT TO APPLY A CORRECTION OF ERROR STANDARD OF REVIEW.

The Industrial Commission's findings regarding the facts surrounding the respondent Gilbert Lamb's multiple industrial accidents are not in dispute. What is in dispute is the legality of the Commission's order based on its interpretation

of the law. (R 254-257.) Therefore, it is proper for this Court to apply a correction-of-error standard of review with no deference to the expertise of the Commission. Board of Education of Apline School District v. Olsen, 684 P.2d 49 (Utah 1984).

B. UNDER THE PRECEDENT IN THIS STATE ADOPTING THE "LAST INJURIOUS EXPOSURE" RULE, JORDAN SCHOOL DISTRICT AS THE CARRIER AT THE TIME OF THE LAST ACCIDENT SHOULD BE LIABLE FOR MR. LAMB'S ENTIRE COMPENSATION AWARD.

That the Commission's interpretation of law upon which it based its order apportioning compensation in this case is erroneous is readily apparent from an analysis of Utah's Worker's Compensation Act and the case law of this and the majority of other states which have dealt with the issue of apportionment.

Utah Code Annotated, Section 35-1-1 et seq. (1953, as amended) establishes a system for compensating workers sustaining job related injuries by accident. Section 46 places the liability for workers compensation benefits for a worker injured as described in Section 45 upon the employer, who in turn may cover the risk by obtaining insurance with the Workers Compensation Fund of Utah, or from a private insurance company, or by being a qualified self-insured entity. The benefits payable by the employer or its insurance carrier are spelled out in considerable detail in the Act, and include the payment of medical expenses incurred in treating the worker's injuries

(Section 81), compensation for temporary total disability during the period the injured worker is recovering from his injuries and unable to work (Section 65), and payment of permanent partial disability compensation for the permanent physical impairment to the worker caused by the injury (Section 66). Expressly stated and implied in this system is the requirement that the injury or injuries giving rise to these disabilities and the need for medical treatment be causally related to an accident occuring while the worker was employed with the employer against whom he is asserting the claim for benefits. Utah Code Annotated, Section 35-1-45 states that the injured employee "shall be paid such compensation for loss sustained on account of such injury...". That is, the injury which occured in the course of his employment with the employer against whom the claim is made.

Given the requirement that there be a causal connection between the loss sustained by the worker and the particular injury for which compensation is claimed, the question has often arisen as it has in this case of what is to be done in those situations where a series of industrial injuries combine to bring about a disability which is greater than would have resulted from any one of the injuries alone. In response to this question a majority of states have adopted either by statute or judicial decision what is known as the "last injurious exposure" rule. See Larson, Workmen's Compensation,

Desk Edition, Volume 2, Section 95.20 at 17-35. Professor Larson explains the operation of this rule:

> The "last injurious exposure" rule in successive injury cases places full liability upon the carrier covering the risk at the time of the most recent injury that bears a causal relation to the disability...Although the statutory provisions for the use of the rule frequently refer only to occupational disease, the rule is often applied in accidental injury cases also.

Larson, Section 95.20 at 17-35, 36.

Professor Larson also mentions that it is important in applying the rule to know what type of injury has been sustained. From the medical panel report upon which the Commission's findings and order are based, it is clear that in the present case, Mr. Lamb's December 5, 1984 injury is characterized as an aggravation of pre-existing injuries. (R 203-204.) If that accident aggravated Mr. Lamb's pre-1980 condition, and the other industrial accidents did the same, it logically follows that the December 5, 1984 injury aggravated the two previous industrial injuries. According to Professor Larson, the "last injurious exposure" rule is applied to cases involving the common situation of "employment under the second insurer aggravating the prior injury..." Larson, Section 95.22 at 17-38. Therefore the "last injurious exposure" rule would apply to the present case if Utah follows the majority of jurisdictions on this question. Arguably, it does.

The first case before the Utah Supreme Court dealing squarely with this issue was Duaine Brown Chevrolet Co. v.

Industrial Commission, 29 Utah 2d 478, 511 P.2d 743 (1973). The injured worker in Brown had sustained a series of injuries while in the course of his employment between the years 1965 and 1970, including an injury on April 1, 1970 while in the employ of Capitol Chevrolet Company and an injury on November 14, 1970 while employed by Duaine Brown Chevrolet Company. The Industrial Commission's medical panel was unable to attribute the worker's herniated discs to any one of the injuries and attempted to apportion the worker's impairment among the various accidents. In upholding the Commission's refusal to apportion liability for benefits among the various accidents and thus requiring the employer at the time of the last accident to pay the entire award, the Court, speaking through Justice Tuckett said:

> Some states have apportionment statutes which allow a recovery to be pro-rated among multiple insurers. We have no such statute in Utah, nor has the court attempted by decision to make apportionments. The record in this case would indicate that Storer's last injury aggravated his prior disability and the act of the commission in assessing the award against the plaintiffs was correct. Citing Larson, Workmen's Compensation, Section 95.31.

29 Utah 2d at 480, 511 P.2d at 745.

Two years after the Brown case, the Utah Supreme Court was asked by another worker's compensation insurance carrier to reverse an Industrial Commission ruling denying apportionment of compensation in a serial accident case. In Mountain States

Steel Co. v. Industrial Commission of Utah, 535 P.2d 1249 (Utah 1975), the Court upheld the Commission's denial of apportionment in a situation where the worker had sustained three back injuries, one in 1969 and two in 1973. Different insurance carriers covered the worker's employer at the time of each of the accidents. In the Commission proceedings the medical panel determined that the first injury had caused a herniated disc and that the second and third injuries had aggravated this condition finally necessitating surgery after the last incident. The panel apportioned a 15% permanent partial disability rating equally among the three carriers. The Commission, however, required the last carrier to pay the entire award. On appeal, the carrier argued that the apportionment of the medical panel was more precise than in Brown. The Court, however, saw nothing in that fact which would require a different result from that in Brown.

As will be readily observed, both of the foregoing cases present fact situations almost identical to the one in this case. The medical panel found that Mr. Lamb had sustained a disability as a result of the accidents of August 10, 1982, June 14, 1984 and December 5, 1984 and assigned a 12.5% disability rating in a lump sum for all of these accidents. (R 203-204.) The only difference in this case is that the Commission is ordering apportionment instead of resisting it as in Brown and Mountain States Steel. Based on the precedents

cited, the Commission was in error and should have required Jordan School District to pay the entire compensation award in the instant case, with recourse to the Second Injury Fund as is discussed below.

C. RECENT UTAH SUPREME COURT DECISIONS HAVE MODIFIED BUT NOT OVERRULED THE "LAST INJURIOUS EXPOSURE" RULE IN SERIAL ACCIDENT CASES.

In its order denying the Workers Compensation Fund's Motion for Review and granting Jordan School District's similar motion, the Industrial Commission cited the case of David v. Industrial Commission, 649 P.2d 82 (Utah 1982) as authority for apportioning workers compensation disability benefits among carriers in multiple accident cases. In addition, the Utah Supreme Court has just recently issued its ruling in the case of Richfield Care Center v. Torgerson, No. 20412, filed February 12, 1987 which seemingly gives some credence to the concept of apportionment of permanent partial disability in serial accident cases. However, it is important to note that in both of these cases the carrier at the time of the earlier accidents admitted liability for permanent partial disability attributable to those earlier accidents and did not contest apportionment of that type of disability compensation on appeal. In a word, no one raised the issue on appeal in these cases, and so it was not before the court. Therefore, it is not surprising that in both of these cases, the Brown and Mountain States Steel cases are not even mentioned, much less

specifically overruled. In addition, as will be more fully discussed below, the uncontested apportionment made in David and Richfield Care Center was only of the permanent partial disability attributable to each accident considered separately. Temporary total disability after the last accident was not apportioned between carriers in either David or Richfield Care Center.

Finally, before relying too heavily on David as authority for apportionment of compensation between carriers, the Utah Supreme Court's pronouncements in the more recent case of United States Fidelity and Guaranty v. The Industrial Commission (Anderton), 657 P.2d 764 (1983) should be considered. In that case, the worker, Cloyde Anderton had sustained an industrial injury in 1962 while employed with KSL Radio. At that time USF&G was the workers compensation carrier for KSL. Then in 1973 while still employed with KSL who was then insured with Fireman's Fund, Mr. Anderton again injured himself. The Court upheld the commission's apportionment of medical expenses between Fireman's Fund and USF&G by relying on prior cases excluding medical expenses from the definition of the term "compensation". The Court said:

> In the instant case, it is thus to be seen that the Commission's order which required USF&G to continue the payment of medicals attributable to Anderton's first injury does not constitute a prohibited apportionment of compensation.

657 P.2d at 766. (Emphasis by the Court.) Unlike in the David case, the Brown and Mountain States Steel cases were

specifically discussed in Anderton. Therefore, one year after the David case, the Court is still saying that apportionment of compensation is "prohibited", and it says this in a case where the issue and prior case law were clearly brought before it. The Industrial Commission's reliance on David as authority for apportionment of compensation in this matter appears to be questionable at best.

Before proceeding to consider the role the Second Injury Fund should have had in this case, one additional comment should be made with respect to the Industrial Commission's basis for apportionment. In the order denying the Workers Compensation Fund's motion for review, the Commission seems to try to distinguish Brown and Mountain States Steel on the basis that none of Mr. Lamb's claims were barred by statutes of limitation at the time he applied for commission adjudication. (R-256.) However, a careful reading of Brown and Mountain States Steel discloses that there were no bars to any of the prior claims in those cases either. Therefore, Brown and Mountain States Steel cannot be explained away on that basis.

D. PURSUANT TO UTAH CODE ANNOTATED, SECTION 35-1-69, THE INDUSTRIAL COMMISSION SHOULD HAVE APPORTIONED LIABILITY FOR MR. LAMB'S COMPENSATION SOLEY BETWEEN JORDAN SCHOOL DISTRICT AND THE SECOND INJURY FUND.

Utah Code Annotated, Section 35-1-69 (1953, as amended) provides for the payment of compensation and medical expenses for a previously incapacitated employee who sustains an

industrial injury which results in permanent incapacity which is substantially greater than would have been incurred had there been no pre-existing incapacity. The statute further provides that compensation shall be awarded on the basis of the combined injuries but that the employer shall only be liable for the compensation and medical care for the industrial injury and that the remainder shall be paid out of the Second Injury Fund. Section 69 goes on to define the term "substantially greater" (which includes any aggravation of a preexisting injury) and to outline the process for reimbursing the carrier for medical expenses and compensation associated with the pre-existing incapacity. (See Addendum)

In Anderton, the Utah Supreme Court indicates that the purpose of the Second Injury Fund as set forth in Utah Code Annotated, Section 35-1-69 (1953, as amended) is to encourage employers to hire the disabled. Consistent with this purpose according to the Court, is the use of the Second Injury Fund to encourage an employer "to retain an injured or disabled employee after an injury without the risk of further liability for payment of compensation and medical expenses should a subsequent injury occur." 657 P.2d at 767. Thus, applying Utah Code Annotated, Section 35-1-69 in a manner consistent with the tenets set forth in Anderton to the case at bar results in alleviating the Workers Compensation Fund of Utah from liability for Mr. Lamb's compensation while requiring it to continue to pay those medical expenses associated with the

previous injuries. At the same time, however, Jordan School District is not forced to shoulder the entire compensation burden. Under the system provided for in Utah Code Annotated, Section 35-1-69, the Second Injury Fund should reimburse Jordan School District for the temporary total compensation expenses attributable to the prior industrial injuries and for the compensation and medical expenses attributable to the other pre-existing conditions aggravated by the last accident, and also pay the permanent disability attributable to the prior injuries and conditions. American Coal Co. v. Sandstrom, 689 P.2d 1 (Utah 1984); Second Injury Fund v. Perry's Mill & Cabinet Shop, 684 P.2d 1269 (Utah 1984); Veyo Concrete Products, Inc. v. Industrial Commission, 710 P.2d 172 (Utah 1985); Richfield Care Center, and Anderton, supra.

Finally, a word concerning the funding of the Second Injury Fund will underscore the public policy enunciated in Anderton which forms the underlying argument against apportioning compensation liability among insurance carriers in multiple accident cases. Under Utah Code Annotated, Sections 31A-3-201(2) and 35-1-53 all insurance companies writing workers compensation insurance in the state, including the Workers Compensation Fund of Utah and all self-insured employers, pay an annual tax on premiums or presumed premiums in order to fund the Second Injury Fund. Thus, the Second Injury Fund is reinsurance designed to effectuate the purposes ennunciated in Anderton by establishing a broader base of

responsibility for pre-existing conditions. McPhie v. United States Steel Corp., 551 P.2d 504 (Utah 1976); Intermountain Smelting Corp. v. Capitano, 610 P.2d 334 (Utah 1980). To apportion compensation as the Industrial Commission did in this case, flies in the face of the stated purposes of the Second Injury Fund and the public policy it was designed to promote. And if the employer discharges an employee after an accident rather than take the risk of having to pay for combined injuries, he or his insurance carrier is still held hostage to the possibility that further liability on the claim might be incurred as the result of a subsequent accident over which that employer will have no control. To estimate adequate claim reserves becomes virtually impossible under such a system. Surely all of this would do little to promote the hiring and continued employment of injured workers. On the basis of public policy the Commission's attempts at multiple carrier apportionment should be rejected, at least until the legislature provides for it.

POINT II

EVEN IF PERMANENT PARTIAL DISABILITY COMPENSATION WERE PROPERLY ASSESSED AGAINST THE WORKERS COMPENSATION FUND, THE INDUSTRIAL COMMISSION ERRED IN APPORTIONING MR. LAMB'S TEMPORARY TOTAL DISABILITY COMPENSATION BETWEEN JORDAN SCHOOL DISTRICT AND THE WORKERS COMPENSATION FUND.

In his order of August 20, 1986, the administrative law judge apportioned liability for medical expenses and permanent partial disability among the Second Injury Fund, the Workers

Compensation Fund of Utah, and the self-insured Jordan School District in accordance with the findings of the medical panel with respect to Mr. Lamb's permanent impairment. (R 212-215, Addendum.) Temporary total disability after the last accident was the sole responsibility of Jordan School District, self-insured. (R-213.) On review by the Commission, the administrative law judge's order was modified so as to require the Workers Compensation Fund to pay 34% of the temporary total disability compensation after the last accident. Under the recent decision of the Utah Supreme Court in Richfield Care Center v. Torgerson, this was clearly in error.

Appellants have previously argued that the apportionment of permanent partial disability in the Richfield Care Center case is not controlling authority over that issue in this matter. However, regardless of how this court views that case in deciding the issue of apportionment of permanent partial disability, it is clear that under the Court's ruling in Richfield Care Center, the Commission should have apportioned liability for Mr. Lamb's temporary total disability after the December 5, 1984 accident soley between the Second Injury Fund and the self-insured Jordan School District. As is stated by the Court in Richfield Care Center:

> the Commission must consider separate accidents serially in order to determine the percentage of impairment attributable to each accident and the proportion the preexisting impairment bears to the total combined impairment.

No. 20412, at p. 3. Thus, under this rule, any impairment attributable to prior industrial accidents becomes preexisting impairment for the purposes of apportioning liability between the Second Injury Fund and the employer or carrier at the time of the last accident.

Following the rule and example laid down in the Richfield Care Center case in the present matter would result in an apportionment of 16% of the benefits paid for the December 5, 1984 accident to the self-insured Jordan School District and 84% to the Second Injury Fund. This is simply computed by taking the administrative law judge's findings regarding the percentages of impairment attributable to each accident along with the impairment which preexisted all of the accidents and dividing that total into the percentage of impairment attributable to the last accident. As Mr. Lamb's impairment from conditions preexisting all the accidents in question is 12.5% and his impairment from the three accidents is 4.5% , 4%, and 4% respectively, the percentage of liability attributable to the last accident is 4/25 or 16% which is the liability chargeable to Jordan School District for benefits paid for the December 5, 1984 accident. The other 21/25 or 84% is the liability of the Second Injury Fund. The Workers Compensation Fund of Utah has no liability for temporary total disability compensation paid after the December 5, 1984 accident.

More could be said regarding the application of the Richfield Care Center case to the facts of this case, especially with regards to the apportionment of liability for medical expenses made by the Commission. But since the Workers Compensation Fund did not have the benefit of that case at the time of the proceedings below, no objection was made to the manner in which medical benefits were apportioned. It is clear, however, that the medical benefits chargeable to the August 1982 and June 1984 accidents should have been apportioned between the Workers Compensation Fund and the Second Injury Fund through a separate analysis as mandated by the Court in Richfield Care Center.

POINT III

EVEN IF TEMPORARY TOTAL DISABILITY COMPENSATION AFTER MR. LAMB'S LAST ACCIDENT CAN BE APPORTIONED TO THE WORKERS COMPENSATION FUND, THE MANNER AND AMOUNT OF APPORTIONMENT BY THE COMMISSION WAS ERRONEOUS.

A. UNDER THE RICHFIELD CARE CENTER RULE, THE PORTIONS OF TEMPORARY TOTAL DISABILITY AFTER MR. LAMB'S LAST ACCIDENT WHICH WERE ATTRIBUTED TO HIS PRIOR ACCIDENTS SHOULD HAVE ALSO BEEN APPORTIONED BETWEEN THE WORKERS COMPENSATION FUND AND THE SECOND INJURY FUND.

In its order granting Jordan School District's motion for review, the Industrial Commission opined that if the surgery of March 14, 1985 was partially caused by the prior accidents then so would be the recovery period after the surgery for which Mr. Lamb would receive temporary total disability compensation. This, of course, is always the case in serial accident

situations involving aggravations of prior injuries and has provided no justification for apportionment in the past. And, the Richfield Care Center case indicates that each accident in the series is to be viewed separately, implying that the subsequent accidents constitute intervening events. If, however, the Commission's logic is adopted in order to assess a portion of the temporary total disability resulting from the March 14, 1985 surgery to the prior accidents, then the portions assessed to those accidents should have been subject to Second Injury Fund apportionment according to the Richfield Care Center ruling. Therefore, since at the time of the 1982 accident, Mr. Lamb had 12.5% preexisting impairment and incurred an additional 4.5% impairment as a result of this accident, (R-213) any benefits attributed to this accident should be apportioned 4.5/17 or 26% to the Workers Compensation Fund and 12.5/17 or 74% to the Second Injury Fund. The same type of analysis is required with respect to the June 1984 accident and results in an apportionment of benefits attributable to that accident of 4/21 or 19% to the Workers Compensation Fund and 81% to the Second Injury Fund. In the Commission's October 23, 1986 order, the Workers Compensation Fund was required to pay 34% of the temporary total disability compensation attributable to the Surgery of March 14, 1985, but no apportionment of the Workers Compensation Fund's liability for this amount was made with the Second Injury Fund. (R-256.) In failing to do so, the Commission has erred.

B. IN ASSESSING PORTIONS OF MR. LAMB'S TEMPORARY TOTAL DISABILITY COMPENSATION TO THE WORKERS COMPENSATION FUND THE COMMISSION ERRED IN NOT APPLYING THE COMPENSATION RATE IN EFFECT AT THE TIME OF THE ACCIDENTS TO WHICH THE COMPENSATION WAS APPORTIONED.

The Industrial Commission's order requiring the Workers Compensation Fund of Utah to pay 34% of the temporary total disability compensation associated with Mr. Lamb's surgery of March 14, 1985 did not make any adjustment for the compensation rates in effect at the time of the prior accidents but was based on the weekly compensation rate in effect at the time of the December 5, 1984 accident. However, Utah Code Annotated, Section 35-1-65 (1953, as amended) clearly states that in cases of temporary total disability the injured worker shall:

> receive 66 and 2/3% of that employee's average weekly wages at the time of the injury so long as such disability is total, but not more than a maximum of 100% of the state average weekly wage at the time of the injury per week...

(Emphasis added.) In its order the Commission does not state what the weekly rate is that it is basing the temporary total disability compensation award on. However, by reference to the original order of the administrative law judge, it is obvious that the rate is the one attributable to and in effect at the time of the last accident. (R-213.) As indicated by the Commission's own published maximum compensation rates (Addendum, item 12) and the above quoted statute, any temporary total disability compensation attributable to the August 1982 accident should be paid at a rate not to exceed $284.00 per

week and any temporary total disability compensation attributable to the June 1984 accident at a rate not to exceed $300.00 per week. By ordering otherwise, the Industrial Commission exceeded its authority.

CONCLUSION

The Appellant herein respectfully requests that the Utah Court of Appeals provide the relief and find as a matter of law as follows:

1. The order of the Industrial Commission of Utah which apportioned liability for Gilbert R. Lamb's disability benefits to the Workers Compensation Fund of Utah as the insurance carrier for Mr. Lamb's employer at the time of his industrial accidents pre-dating his most recent industrial accident should be reversed and modified so that Jordan School District and the Second Injury Fund share sole responsibility for these benefits. There is no statutory authority for the Commission to make an apportionment of disability compensation between insurance carriers or employers in a multiple accident case and the Utah Supreme Court has so held.

2. In the alternative, if this Court beleives there was sufficient authority for the Commission to apportion the permanent partial disability compensation attributable to the prior accidents, that part of the Commission's order apportioning temporary total disability compensation payable after the last accident to the Workers Compensation Fund should

be reversed and modified so that the self-insured Jordan School District and the Second Injury Fund share sole liability for those benefits.

3. If, in the alternative, this Court believes that the Workers Compensation Fund can be held liable for a portion of the temporary total disability compensation payable after Mr. Lamb's last industrial accident, then the order of the Industrial Commission should be modified so that the accidents are considered separately for purposes of assessing the Second Injury Fund's share of that compensation as mandated by the Utah Supreme Court's recent decisions and also modified so that any portion assessed to Mr. Lamb's prior accidents is payable at the compensation rates in effect at the time of those accidents.

DATED this 25 day of February, 1987.

WORKERS COMPENSATION FUND OF UTAH

Elliot K. Morris

Elliot K. Morris

CERTIFICATE OF DELIVERY

I hereby certify that four true and correct copies of the above and foregoing Brief of Appellant, was either mailed postage paid or hand delivered, on the _____ day of February, 1987, to the following:

Michael J. Mazuran
Attorney at Law
#9 Exchange Place, Suite 100
Salt Lake City, UT 84111

Robert A. Burton
Attorney at Law
Sixth Floor, Boston Bldg.
Salt Lake City, UT 84111

Erie V. Boorman
Administrator
Second Injury Fund
P.O. Box 45580
Salt Lake City, UT 84145-0580

David Wilkinson
Attorney General
State Capitol
Salt Lake City, UT 84114

By_____

ADDENDUM

ITEM 1

Utah Code Annotated, Section 35-1-45

35-1-45. Compensation for industrial accidents to be paid.

Every employee mentioned in Section 35-1-43 who is injured, and the dependents of every such employee who is killed, by accident arising out of or in the course of his employment, wherever such injury occurred, if the accident was not purposely self-inflicted, shall be paid compensation for loss sustained on account of the injury or death, and such amount for medical, nurse, and hospital services and medicines, and, in case of death, such amount of funeral expenses, as provided in this chapter. The responsibility for compensation and payment of medical, nursing, and hospital services and medicines, and funeral expenses provided under this chapter shall be on the employer and its insurance carrier and not on the employee.

History: L. 1917, ch. 100, § 52a; C.L. 1917, § 3113; L. 1919, ch. 63, § 1; R.S. 1933 & C. 1943, 42-1-43; L. 1984, ch. 75, § 1.

Compiler's Notes. — The 1984 amendment substituted "as provided in this chapter" in the first sentence for "as is herein provided"; added the second sentence; and made minor changes in phraseology, punctuation and style.

ADDENDUM

ITEM 2

Utah Code Annotated, Section 35-1-46

35-1-46. Employers to secure workers' compensation benefits for employees — Methods — Failure — Notice — Injunction — Violation.

(1) Employers, including counties, cities, towns, and school districts, shall secure the payment of workers' compensation benefits for their employees:

(a) By insuring, and keeping insured, the payment of this compensation with the Workers' Compensation Fund of Utah, which payments shall commence within 90 days after any final award by the commission;

(b) By insuring, and keeping insured, the payment of this compensation with any stock corporation or mutual association authorized to transact the business of workers' compensation insurance in this state, which payments shall commence within 90 days after any final award by the commission;

(c) By furnishing annually to the commission satisfactory proof of financial ability to pay direct compensation in the amount, in the manner, and when due as provided for in this title, which payments shall commence within 90 days after any final award by the commission. In these cases the commission may in its discretion require the deposit of acceptable security, indemnity, or bond to secure the payment of compensation liabilities as they are incurred, and may at any time change or modify its findings of fact herein provided for, if in its judgment this action is necessary or desirable to secure or assure a strict compliance with all the provisions of law relating to the payment of compensation and the furnishing of medical, nurse, and hospital services, medicines, and burial expenses to injured employees and to the dependents of killed employees. The commission may in proper cases revoke any employer's privilege as a self-insurer.

(2) The commission is authorized and empowered to maintain a suit in any court of the state to enjoin any employer, within the provisions of this act, from further operation of the employer's business, where the employer has failed to provide for the payment of benefits in one of the three ways in this section provided. Upon a showing of failure to so provide, the court shall enjoin the further operation of the employer's business until the payment of these benefits has been secured by the employer as required by this section. The court may enjoin the employer without requiring bond from the commission.

If the commission has reason to believe that an employer of one or more employees is conducting a business without securing the payment of compensation in one of the three ways provided in this section, the commission may give such employer five days' written notice by registered mail of such noncompliance and if the employer within said period does not remedy such default, the commission may file suit as in this section above provided and the court is empowered, ex parte to issue without bond a temporary injunction restraining the further operation of the employer's business.

History: L. 1917, ch. 100, § 53; C.L. 1917, § 3114; L. 1921, ch. 67, § 1; 1923, ch. 64, § 1; 1925, ch. 80, § 1; R.S. 1933, 42-1-44; L. 1939, ch. 51, § 1; C. 1943, 42-1-44; L. 1945, ch. 65, § 1; 1949, ch. 52, § 1; 1969, ch. 86, § 1; 1977, ch. 156, § 3; 1986, ch. 204, § 271; 1986, ch. 211, § 5.

Compiler's Notes. — The 1977 amendment substituted "including" for "except" near the beginning of the section; and added "which payments shall commence within 90 days of any final award of the commission" to the end of subds. (1) and (2) and to the end of the first sentence of subd. (3).

The 1986 amendment by Laws 1986, ch. 204, effective July 1, 1986, substituted "Workers' Compensation Fund of Utah" for "State Insurance Fund" in Subsection (1) and made minor stylistic changes.

The 1986 amendment by Laws 1986, ch. 211, effective July 1, 1986, designated the introductory language as Subsection (1), substituted "the payment of workers' compensation benefits for" for "compensation to" and deleted "in one of the following ways" following "employees" in Subsection (1); redesignated former Subsection (1) as present Subsection (1)(a) and made stylistic changes therein; redesignated Subsection (2) as Subsection (1)(b) and made stylistic changes therein; redesignated Subsection (3) as Subsection (1)(c) and made stylistic changes therein; designated the paragraph following Subsection (1)(c) as Subsection (2) and in Subsection (2) deleted "hereby" before "authorized", substituted "provide for the payment of benefits" for "insure or keep insured", substituted "Upon" for "the payment of compensation to injured employees, and upon", substituted "so provide" for "insure" following "failure to", substituted "the payment of these benefits has been secured by the employer as required by this section" for "such time as such insurance has been obtained by such employer" and made stylistic changes; and deleted the last paragraph of the section.

This section is set out as reconciled by the Office of Legislative Research and General Counsel.

Meaning of "this act". — The phrase "this act" in the first paragraph of Subsection (2) apparently refers to this chapter.

ADDENDUM

ITEM 3

Utah Code Annotated, Section 35-1-65

35-1-65. Temporary disability — Amount of payments — State average weekly wage defined.

(1) In case of temporary disability, the employee shall receive 66⅔% of that employee's average weekly wages at the time of the injury so long as such disability is total, but not more than a maximum of 100% of the state average weekly wage at the time of the injury per week and not less than a minimum of $45 per week plus $5 for a dependent spouse and $5 for each dependent child under the age of 18 years, up to a maximum of four such dependent children, not to exceed the average weekly wage of the employee at the time of the injury, but not to exceed 100% of the state average weekly wage at the time of the injury per week. In no case shall such compensation benefits exceed 312 weeks at the rate of 100% of the state average weekly wage at the time of the injury over a period of eight years from the date of the injury.

In the event a light duty medical release is obtained prior to the employee reaching a fixed state of recovery, and when no such light duty employment is available to the employee from the employer, temporary disability benefits shall continue to be paid.

(2) The "state average weekly wage" as referred to in chapters 1 and 2 of this Title shall be determined by the commission as follows: on or before June 1 of each year, the total wages reported on contribution reports to the department of employment security under the commission for the preceding calendar year shall be divided by the average monthly number of insured workers determined by dividing the total insured workers reported for the preceding year by twelve. The average annual wage thus obtained shall be divided by 52, and the average weekly wage thus determined rounded to the nearest dollar. The state average weekly wage as so determined shall be used as the basis for computing the maximum compensation rate for injuries or disabilities arising from occupational disease which occurred during the twelve-month period commencing July 1 following the June 1 determination, and any death resulting therefrom.

History: L. 1917, ch. 100, § 76; C.L. 1917, § 3137; L. 1919, ch. 63, § 1; 1921, ch. 67, § 1; R.S. 1933, 42-1-61; L. 1937, ch. 41, § 1; 1939, ch. 51, § 1; C. 1943, 42-1-61; L. 1945, ch. 65, § 1; 1949, ch. 52, § 1; 1951, ch. 55, § 1; 1955, ch. 57, § 1; 1957, ch. 62, § 1; 1959, ch. 55, § 1; 1961, ch. 71, § 1; 1963, ch. 49, § 1; 1965, ch. 68, § 1; 1967, ch. 65, § 1; 1969, ch. 86, § 3; 1971, ch. 76, § 4; 1973, ch. 67, § 2; 1975, ch. 101, § 4; 1977, ch. 151, § 1; 1981, ch. 287, § 1.

Compiler's Notes. — The 1975 amendment, in subsec. (1), substituted "100%" for "66⅔" before "of the state average weekly wage" in three places; increased the minimum benefit per week from $35 to $45 in the first sentence of subsec. (1); and inserted "not to exceed the average weekly wage of the employee at the time of the injury" in the first sentence of subsec. (1).

The 1977 amendment substituted "that employee's" for "his" near the beginning of subsec. (1); and substituted "spouse" for "wife" near the middle of subsec. (1).

The 1981 amendment deleted "minor" before "child" and "children" in the first paragraph of subsec. (1); added the last paragraph in subsec. (1); and made a minor change in style.

ADDENDUM

ITEM 4

Utah Code Annotated, Section 35-1-66

The commission may make a permanent partial disability award at any time prior to eight years after the date of injury to an employee whose physical condition resulting from such injury is not finally healed and fixed eight years after the date of injury and who files an application for such purpose prior to the expiration of such eight-year period.

In no case shall the weekly payments continue after the disability ends, or the death of the injured person.

In the case of the following injuries the compensation shall be 66⅔% of that employee's average weekly wages at the time of the injury, but not more than a maximum of 66⅔% of the state average weekly wage at the time of the injury per week and not less than a minimum of $45 per week plus $5 for a dependent spouse and $5 for each dependent child under the age of 18 years, up to a maximum of four such dependent children, but not to exceed 66⅔% of the state average weekly wage at the time of the injury per week, to be paid weekly for the number of weeks stated against such injuries respectively, and shall be in addition to the compensation provided for temporary total disability and temporary partial disability, to wit:

For the loss of:	Number of Weeks
(A) Upper extremity	
(1) Arm	
(a) Arm and shoulder (forequarter amputation)	218
(b) Arm at shoulder joint, or above deltoid insertion	187
(c) Arm between deltoid insertion and elbow joint, at elbow joint, or below elbow joint proximal to insertion of biceps tendon	178
(d) Forearm below elbow joint distal to insertion of biceps tendon	168
(2) Hand	
(a) At wrist or midcarpal or midmetacarpal amputation	168
(b) All fingers except thumb at metacarpophalangeal joints	101
(3) Thumb	
(a) At metacarpophalangeal joint or with resection of carpometacarpal bone	67
(b) At interphalangeal joint	50
(4) Index finger	
(a) At metacarpophalangeal joint or with resection of metacarpal bone	42
(b) At proximal interphalangeal joint	34
(c) At distal interphalangeal joint	18
(5) Middle finger	
(a) At metacarpophalangeal joint or with resection of metacarpal bone	34
(b) At proximal interphalangeal joint	27
(c) At distal interphalangeal joint	15
(6) Ring finger	
(a) At metacarpophalangeal joint or with resection of metacarpal bone	17
(b) At proximal interphalangeal joint	13
(c) At distal interphalangeal joint	8
(7) Little finger	
(a) At metacarpophalangeal joint or with resection of metacarpal bone	8
(b) At proximal interphalangeal joint	6
(c) At distal interphalangeal joint	4
(B) Lower extremity	
(1) Leg	
(a) Hemipelvectomy (leg, hip and pelvis)	156
(b) Leg at hip joint or three inches or less below tuberosity of ischium	125
(c) Leg above knee with functional stump, at knee joint or Gritti-Stokes amputation or below knee with short stump (three inches or less below intercondylar notch)	112
(d) Leg below knee with functional stump	88
(2) Foot	
(a) Foot at ankle	88
(b) Foot partial amputation (Chopart's)	66
(c) Foot midmetatarsal amputation	44
(3) Toes	
(a) Great toe	
(i) With resection of metatarsal bone	26

For the loss of:	Number of Weeks
(ii) At metatarsophalangeal joint	16
(iii) At interphalangeal joint	12
(b) Lesser toe (2nd — 5th)	
(i) With resection of metatarsal bone	4
(ii) At metatarsophalangeal joint	3
(iii) At proximal interphalangeal joint	2
(iv) At distal interphalangeal joint	1
(c) All toes at metatarsophalangeal joints	26
(4) Miscellaneous	
(a) One eye by enucleation	120
(b) Total blindness of one eye	100
(c) Total loss of binaural hearing	100

(C) Permanent and complete loss of use shall be deemed equivalent to loss of the member. Partial loss or partial loss of use shall be a percentage of the complete loss or loss of use of the member. This paragraph, however, shall not apply to the items listed (B) (4).

Permanent hearing loss caused by accident shall be determined and paid as follows:

"Loss of hearing" is defined as the binaural hearing loss measured in decibels with frequencies of 500, 1000, 2000, and 3000 cycles per second (cps) using pure tone air conduction audiometric instruments (ANSI 1969) approved by nationally recognized authorities in the field of measurement of hearing impairment. Reduction of hearing ability in frequencies above 3000 cycles per second shall not be considered in determining compensable disability. If the average decibel loss at 500, 1000, 2000, and 3000 cycles per second is 25 decibels or less, usually no hearing impairment exists.

"Presbycusis" is defined as hearing loss common to persons of advanced age and is considered to be due to general environment rather than industrial conditions.

In measuring hearing loss, a medical panel of medical and paramedical professionals appointed by the commission shall measure the loss in each ear at the four frequencies 500, 1000, 2000, and 3000 cycles per second which shall be added together and divided by four to determine the average decibel loss. To determine the percentage of hearing loss in each ear, the average decibel loss for each decibel of loss exceeding 25 decibels shall be multiplied by 1½% up to the maximum of 100% which is reached at 92 decibels.

Binaural hearing loss is determined by multiplying the percentage of hearing loss in the better ear by five, then adding the percentage of hearing loss in the poorer ear and dividing by six. The resulting figure is the percentage of binaural hearing loss. Compensation for permanent partial disability for binaural hearing loss shall be determined by multiplying the

percentage of binaural hearing loss by 100 weeks of compensation benefits as provided in this chapter. Where an employee files one or more claims for hearing loss the percentage of hearing loss previously found to exist shall be deducted from any subsequent award by the commission. In no event shall compensation benefits be paid for total or 100% binaural hearing loss exceeding 100 weeks of compensation benefits.

For any other disfigurement or the loss of bodily function not otherwise provided for herein, such period of compensation as the commission shall deem equitable and in proportion as near as may be to compensation for specific loss as set forth in the schedule in this section but not exceeding in any case 312 weeks, which shall be considered the period of compensation for permanent total loss of bodily function.

The amounts specified in this section are all subject to the limitations as to the maximum weekly amount payable as specified in this section, and in no event shall more than a maximum of 66 2/3% of the state average weekly wage at the time of the injury for a total of 312 weeks in compensation be required to be paid.

History: L. 1917, ch. 100, § 77; C.L. 1917, § 3138; L. 1919, ch. 63, § 1; R.S. 1933, 42-1-62; L. 1937, ch. 41, § 1; 1939, ch. 51, § 1; C. 1943, 42-1-62; L. 1945, ch. 65, § 1; 1949, ch. 52, § 1; 1951, ch. 55, § 1; 1955, ch. 57, § 1; 1957, ch. 62, § 1; 1959, ch. 55, § 1; 1961, ch. 71, § 1; 1963, ch. 49, § 1; 1965, ch. 68, § 1; 1967, ch. 65, § 1; 1969, ch. 86, § 4; 1971, ch. 76, § 5; 1973, ch. 67, § 3; 1977, ch. 151, § 2; 1977, ch. 156, § 5; 1981, ch. 287, § 3; 1983, ch. 357, § 1.

Compiler's Notes. — The 1977 amendment by chapter 151 substituted "spouse" for "wife" in the former first and present third paragraphs; and made minor changes in phraseology.

The 1977 amendment by chapter 156 made the same changes as the 1977 amendment by chapter 151; and in the present third paragraph increased the minimum compensation from $35 to $45 per week.

The 1981 amendment deleted a beginning paragraph which read: "Where the injury causes partial disability for work, the employee shall receive, during such disability for not to exceed 312 weeks over a period of not to exceed eight years from the date of the injury, compensation equal to 66 2/3% of the difference between that employee's average weekly wages before the accident and the weekly wages that employee is able to earn thereafter, but no more than a maximum of 66 2/3% of the state average weekly wage at the time of the injury per week and in addition thereto $5 for a dependent spouse and $5 for each dependent minor child under the age of eighteen years, up to a maximum of four *such dependent minor children, but not to exceed* 66 2/3% of the state average weekly wage at the time of the injury per week"; deleted a former third paragraph which read: "In case the partial disability begins after a period of total disability, the period of total disability shall be deducted from the total period of compensation"; deleted "minor" before "child" and "children" in the first sentence of the third paragraph; inserted "and temporary partial disability" in the first sentence of the third paragraph; and made minor changes in phraseology.

The 1983 amendment inserted "and 3000" and substituted "(ANSI 1969)" for "(ASA 1951)" in the first sentence of the fifth paragraph; substituted "3000" in the second sentence of the fifth paragraph for "2000"; added the third sentence of the fifth paragraph; substituted "four" in two places for "three" and inserted "and 3000" in the first sentence of the seventh paragraph; deleted a second sentence in the seventh paragraph which read: "To allow for presbycusis, there shall be deducted from the average decibel loss 1/2 a decibel for each year of the employee's age over forty at the time of the accident"; deleted "(after deduction of the loss in decibels for presbycusis)" after "ear," substituted "25 decibels" for "fifteen decibels," and substituted "82 decibels" for "92 decibels" in the second

ADDENDUM

ITEM 5

Utah Code Annotated, Section 35-1-69

35-1-69. Combined injuries resulting in permanent incapacity — Payment out of Second Injury Fund — Training of employee.

(1) If any employee who has previously incurred a permanent incapacity by accidental injury, disease, or congenital causes, sustains an industrial injury for which either compensation or medical care, or both, is provided by this chapter that results in permanent incapacity which is substantially greater than he would have incurred if he had not had the pre-existing incapacity, or which aggravates or is aggravated by such pre-existing incapacity, compensation, medical care, and other related items as outlined in Section 35-1-81, shall be awarded on the basis of the combined injuries, but the liability of the employer for such compensation, medical care, and other related items shall be for the industrial injury only. The remainder shall be paid out of the Second Injury Fund provided for in Subsection 35-1-68 (1), and shall be determined after assigning the impairment for the industrial injury on a whole person uncombined basis and then deducting this percentage from the total combined rating. This combined impairment rating may not exceed 100%.

For purposes of this section, (a) any aggravation of a pre-existing injury, disease, or congenital cause shall be deemed "substantially greater", and compensation, medical care, and other related items shall be awarded on the basis of the combined injuries as provided in this Subsection (1), and (b) where there is no such aggravation, no award for combined injuries may be made unless the percentage of permanent physical impairment attributable to the industrial injury is 10% or greater and the percentage of permanent physical impairment resulting from all causes and conditions, including the industrial injury, is greater than 20%. In determining the impairment thresholds and assessment of liability in favor of the employee and apportionment between the carrier or employer and the Second Injury Fund, the permanent physical impairment attributable to the industrial injury or the pre-existing condition or overall impairment, shall be considered on a whole person uncombined basis. If the pre-existing incapacity referred to in this Subsection (1)(b) previously has been compensated for, in whole or in part, as a permanent partial disability under this chapter or Chapter 2, Title 35, the Utah Occupational Disease Disability Law, such compensation shall be deducted from the liability assessed to the Second Injury Fund under this paragraph.

If the payment of temporary disability benefits, medical expenses, or other related items are required as a result of the industrial injury subject to this section, the employer or its insurance carrier shall be responsible for all such temporary benefits, medical care, or other related items up to the end of the period of temporary total disability resulting from the industrial injury. Any allocation of disability benefits, medical care, or other related items following such period shall be made between the employer or its insurer and the Second Injury Fund as provided for in this section, and any payments made by the employer or its insurance carrier in excess of its proportionate share shall be recoverable at the time of the award for combined disabilities if any is made.

A medical panel having the qualifications of the medical panel set forth in Section 35-2-56, shall review all medical aspects of the case and determine first, the total permanent physical impairment resulting from all causes and conditions including the industrial injury; second, the percentage of permanent physical impairment attributable to the industrial injury; and third, the percentage of permanent physical impairment attributable to the previously existing condition, whether due to accidental injury, disease, or congenital causes. The Industrial Commission shall then assess the liability for permanent partial disability compensation and future medical care to the employer on the basis of the percentage of permanent physical impairment attributable to the industrial injury only and any amounts remaining to be paid shall be payable out of the Second Injury Fund. Medical expenses shall be paid in the first instance by the employer or its insurance carrier. Amounts, if any, which have been paid by the employer in excess of the portion attributable to the industrial injury shall be reimbursed to the employer out of the Second Injury Fund upon written request and verification of amounts so expended.

(2) The commission may increase the weekly compensation rates to be paid out of this special fund. This increase shall be used for the rehabilitation and training of any employee coming under this chapter as may be certified to the commission by the Rehabilitation Department of the State Board of Education as being eligible for rehabilitation and training. There may not be paid out of such special fund for rehabilitation an amount in excess of $1,000.

History: L. 1917, ch. 100, § 79; C.L. 1917, § 3140, subsec. 6; L. 1921, ch. 67, § 1; R.S. 1933 & C. 1943, 42-1-65; L. 1945, ch. 65, § 1; 1955, ch. 57, § 1; 1957, ch. 62, § 1; 1959, ch. 55, § 1; 1963, ch. 49, § 1; 1965, ch. 68, § 1; 1969, ch. 86, § 7; 1973, ch. 67, § 6; 1981, ch. 287, § 4; 1984, ch. 79, § 1.

Compiler's Notes. — The 1981 amendment substituted "either compensation or medical care, or both" in the first paragraph of subsec. (1) for "compensation and medical care"; inserted "or which aggravates or is aggravated by such pre-existing incapacity" in the first paragraph of subsec. (1); substituted "compensation, medical care and other related items as outlined" in the first paragraph of subsec. (1) for "compensation and medical care, which medical care and other related items are outlined"; inserted "and other related items" before "shall be" in the first paragraph of subsec. (1); substituted "second injury fund" in the first and last paragraphs of subsec. (1) for "special fund"; deleted "hereinafter referred to as the 'special fund"' at the end of the first paragraph of subsec. (1); inserted the second and third paragraphs of subsec. (1); inserted "permanent partial disability" in the second sentence of the last paragraph of subsec. (1); inserted "future" in the second sentence of the last paragraph of subsec. (1); substituted "any amounts remaining to be paid hereunder" in the second sentence of the last paragraph of subsec. (1) for "the remainder"; inserted the provisions of the present third sentence of the fourth paragraph of subsec. (1); inserted "upon written request and verification of amounts so expended" in the last sentence of the last paragraph of subsec. (1); and made minor changes in phraseology and punctuation.

The 1984 amendment substituted "chapter" for "title" in the first sentence of subsec. (1); added "and shall be determined after assigning the impairment for the industrial injury on a whole person uncombined basis and then deducting this percentage from the total combined rating" to the second sentence of subsec. (1); added the third sentence to subsec. (1); inserted the second sentence in the second paragraph of subsec. (1); and substituted "this chapter or Chapter 2, Title 35" for "this act or" in the third sentence of the second paragraph of subsec. (1); and made minor changes in phraseology, punctuation, and style.

ADDENDUM

ITEM 6

Utah Code Annotated, Section 35-1-53

35-1-53. Tax on employers and counties, cities, towns, or school districts paying compensation direct.

(1) Employers who by authority of the commission are authorized to pay compensation direct shall pay annually, on or before March 1, a tax of the same percentage as required by law to be paid by insurance companies upon their premiums, based upon an amount equivalent to premiums, which would be paid by such employer, if insured in the Workers' Compensation Fund of Utah; said tax to be computed and collected by the State Tax Commission and paid by it into the state treasury as provided in Subsection 31A-3-201 (2).

(2) Every county, city, town, or school district which elects to pay compensation direct shall pay annually to the State Tax Commission for payment to the state treasurer to the credit of the special fund provided for in Subsection 35-1-68 (1) and as provided in Subsection 31A-3-201 (2), on or before March 1, an amount equal to the same percentage as required by law to be paid by insurance companies writing workmen's compensation and occupational disease disability insurance upon their premiums, based upon an amount equivalent to the premiums which would be paid by that employer if insured in the Workers' Compensation Fund of Utah.

(3) The State Tax Commission shall have access to all the records of the office of the Industrial Commission for the purpose of computing and collecting any amounts described in this section.

History: L. 1917, ch. 100, § 64; C.L. 1917, § 3125; L. 1921, ch. 67, § 1; R.S. 1933 & C. 1943, 42-1-51; L. 1963, ch. 49, § 1; 1971, ch. 76, § 2; 1981, ch. 145, § 3; 1985, ch. 242, § 34; 1986, ch. 204, § 275.

Compiler's Notes. — The 1981 amendment substituted "March 1" in subsecs. (1) and (2) for "the first day of September in each year"; and added the last sentence to subsec. (1).

The 1986 amendment, effective July 1, 1986, throughout the section, substituted "Workers' Compensation Fund of Utah" for "State Insurance Fund" and "Subsection 31A-3-201 (2)" for "Section 31-14-4 (3)"; in Subsection (1), deleted the last sentence, which provided: "The provisions of Section 31-14-4 (6) shall not apply in the case of taxes paid under this section."; and made minor stylistic changes.

ADDENDUM

ITEM 7

Utah Code Annotated, Section 31A-3-201(2)(a)(b)

(2) (a) Every admitted insurer writing workers' compensation insurance in this state, including the Workers' Compensation fund of Utah under Chapter 3, Title 35, shall pay to the state tax commission, on or before March 31 in each year, a tax of between 3¼% and 3¼% of the total premiums received by it from workers' compensation insurance in this state during the preceding calendar year. The percentage of premium applicable in any given year shall be determined by the Industrial Commission at least 90 days prior to the payment date, and any percentage of premium over 3¼% shall reflect the reasonable reserves necessary to maintain the Uninsured Employers' Fund provided for in § 35-1-107 in an actuarially sound financial condition. This taxable premium shall be reduced in the same manner as provided in Subsections (1)(a) and (1)(b), but not as provided in Subsection (1)(c). The State Tax Commission shall remit from the tax collected under this subsection an amount equal to 3% of the premium to the Second Injury Fund created under Subsection 35-1-68(1), ¼% of the premium to the General Fund, and any remaining applicable percentage of the premium to the Uninsured Employers' Fund created under § 35-1-107. No tax that is to be transferred into the General Fund may be collected on premiums received from Utah public agencies.

(b) Effective July 1, 1987, the variable tax provided in Subsection (2)(a) shall be replaced by a flat tax of 3¼%.

ADDENDUM

ITEM 8

FINDINGS OF FACT, CONCLUSIONS OF LAW, & ORDER

THE INDUSTRIAL COMMISSION OF UTAH

Case Nos. 85000257, 85000508, 85000509, and 85000510

GILBERT R. LAMB, Applicant, vs. JORDAN SCHOOL DISTRICT (self-insured) and/or WORKERS' COMPENSATION FUND OF UTAH (formerly State Insurance Fund) and/or SECOND INJURY FUND, Defendants.	FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER

HEARING: Hearing Room 334, Industrial Commission of Utah, 160 East Broadway, Salt Lake City, Utah, on September 30, 1985, at 8:30 a.m.; same being pursuant to Order and Notice of the Commission.

BEFORE: Timothy C. Allen, Administrative Law Judge.

APPEARANCES: The Applicant was present and represented by Ronald L. Dunn, Attorney at Law.

The Defendant Jordan School District was represented by William Bannon, Attorney at Law.

The Workers' Compensation Fund was represented by Elliot K. Morris, Attorney at Law.

Following the evidentiary hearing, the medical issues and questions were submitted to a Medical Panel appointed by the Administrative Law Judge. The Medical Panel Report was received, and copies were distributed to the parties. The Administrative Law Judge requested a clarification, and following receipt of the clarification of the Medical Panel Report, it was submitted to the parties. No objections having been received to the clarified response of the Panel or the Medical Panel Report, the Medical Panel Report and the clarification are admitted into evidence.

FINDINGS OF FACT:

Gilbert R. Lamb was employed by Jordan School District as an electrician in their maintenance shop. On November 18, 1980, Mr. Lamb was in

the shop warehouse looking for an electrical motor. In order to look on the bottom shelf, the Applicant was straddled over a motor which was approximately 2 1/2 feet tall. As he twisted to look on the lower shelf, he felt a pop in his back and had immediate pain which radiated down his legs to the back of his knees. The warehouseman that was present helped the Applicant stand up, and he was able to finish the shift with back pain, since his leg pain had subsided. He completed an accident report and saw his family physician, Dr. Haymes, that evening and was given muscle relaxants for a back sprain. The following morning Mr. Lamb was sore but was able to return to work. After three days of muscle relaxants he was much improved and had no further problems.

In approximately 1960 Mr. Lamb was working for Central Electric in Santa Maria, California. As a result he hurt his back and was required to report to an emergency room for treatment. He was given a Cortisone injection which improved his condition. He had no further problems with his back until the injury of November 18, 1980.

On August 10, 1982, Mr. Lamb was working on the lights in a swimming pool at a middle school. He was required to climb up and down a ladder into the swimming pool, and he was also climbing into a tunnel which ran around the perimeter of the pool. On one of these occasions the Applicant was climbing out of the pool, and as he swung his leg over the side, he had a knife-like sharp pain in his low back and down his legs. Mr. Lamb had to be assisted out of the pool. He filled out an accident report and then took it easy for the rest of the shift. That evening as he was walking into his house, his legs buckled and he fell to the ground. He was taken to the Alta View Emergency Room and after receiving x-rays was seen by Dr. Edward Spencer. Dr. Spencer informed the Applicant that he had spondylolysis and spondylolisthesis and a muscle sprain. Dr. Spencer made an appointment for the Applicant to see him for follow-up treatment. The Applicant "chickened out" and instead went to see Dr. Allan Billeter, since he had received chiropractic treatments from him twenty or thirty years prior to that occasion. The Applicant indicated that he had received chiropractic treatments in the past and that as a result he had been able to return to work. On August 16, 1982, he was seen by Dr. Billeter and received approximately five chiropractic adjustments. On September 15 he was sent to the Cottonwood Hospital by Dr. Haymes for x-rays and a CT scan.. The Applicant lost four days from work as a result of this injury. He returned to work and continued to work without problems until about a month later, when he noticed some back pain. However, he did not take any medication for the pain but, rather, kept working. He reported no further problems with his back, and he stated that in June of 1984 his back felt great.

On June 14, 1984, Mr. Lamb was working on a rooftop heating and air conditioning unit at Brighton High School. As part of this work they were changing a shaft weighing approximately fifteen pounds. The Applicant was carrying this five-foot shaft on his shoulder when he had to jump approximately 3 1/2 feet down from one roof to another. As he did so, his left foot slipped upon his landing, and he caught himself so as not to damage the shaft.

However, when he did so, he felt a pain in his low back between his shoulder blades. He advised his supervisor that he had hurt his back, and he was instructed to see a doctor. Since the Applicant had seen Dr. McClean for chiropractic adjustments on his neck a few days prior, he called his office. However, the doctor was out of town on vacation, so he was seen by Dr. Egbert for chiropractic adjustments until Dr. McClean returned. The Applicant then resumed treatments with Dr. McClean in late June of 1984 and was able to continue working as a result of the adjustments for the rest of the summer.

On December 5, 1984, the Applicant had gone to the shop to get his work orders for the day. As he was walking in the parking lot to his truck, he slipped on some ice but was able to catch himself on the front end of a pickup. However, in doing so he wrenched his back and felt a pain. Since he felt he had an easy morning, he decided to go on to work. He reported to the Jordan High School maintenance department to see what the job there involved. He was informed that he would be checking on some lights, so he had a helper there at the school that could carry his ladder. Mr. Lamb could hardly climb the ladder, so he returned to the main shop and told his foreman that he was having problems with his back. He filled out an accident report and then helped with some paperwork in the office until noon. At that time his wife came and picked him up.

The Applicant returned to work the following morning, but because he was in such extreme pain, he was only able to work approximately one hour. He informed his foreman that he would need to see a doctor, and he then went home and called Dr. Lancaster. The doctor was not in, so the Applicant reported to his office the following day, December 7, 1984, for a chiropractic adjustment. Dr. Lancaster instructed the Applicant to see Dr. Glenn Momberger for treatment at his back clinic. The Applicant was informed by Dr. Momberger's office that the doctor would not be able to see him for approximately two weeks or longer, so Mr. Lamb returned to Dr. McClean for chiropractic treatments until the end of January 1985. As a result of the adjustments, his leg pain was eliminated and he was only having pain in his hips. However, if he bent over, he would have a recurrence of leg pain. The adjusting firm for the Jordan School District terminated the Applicant's chiropractic treatments in January of 1985 and also terminated his temporary total disability effective January 31, 1985.

Arrangements were then made for the Applicant to see Dr. Robert Morrow for an independent medical examination. Dr. Morrow saw the Applicant on February 8, 1985, and at that time advised that he would require back surgery. Thereafter the Applicant was referred to the Western Neurological Associates for a CT scan, and he was then referred to Cottonwood Hospital for a discogram, which he received on February 28, 1985. On March 13 the Applicant was admitted to the St. Mark's Hospital for back surgery. On the following day Dr. Morrow performed a lumbar discectomy at L4-5 and L6-S1 with an interbody fusion. The Applicant apparently had an uneventful recovery, and in July of 1985 he was referred to Alan Bluth for physical therapy.

The Applicant's present complaints are that he has back pain and some leg pain.

Because of the denial of liability for the surgery of March 14, 1985, the file was referred to a Medical Panel for its evaluation. The Medical Panel found that the Applicant reached a fixed state of recovery following the industrial accident of December 5, 1984, approximately nine months after his surgery of March 14, 1985. The Panel also found that the surgery in question was necessitated by the Applicant's preexisting conditions and all of the industrial injuries he sustained at Jordan School District. The Panel found that the Applicant has sustained a 12.5 percent permanent partial impairment due to preexisting back problems, and they found 12.5 percent due to the industrial injuries of December 5, 1984; June 14, 1984; and August 10, 1982, with the injury of August 10 being the " . . . foremost in causing his ongoing symptoms . . . ." The Panel also determined that the preexisting conditions were aggravated by each of the Applicant's industrial accidents. Finally, the Panel opined that the Applicant " . . . may require additional surgery in the future related to the graft instability." The Administrative Law Judge adopts the findings of the Medical Panel as his own.

Pursuant to the findings of the Medical Panel, the Applicant is entitled to additional temporary total disability resulting from the industrial accident of December 5, 1984, for the period February 1, 1985, through December 14, 1985, or a period of 45 weeks and two days. At the time of his industrial accident of December 5, 1984, the Applicant was earning wages sufficient to entitle him to the maximum award of $310.00 per week in benefits. In reviewing the file, the Administrative Law Judge notes that the Jordan School District paid the Applicant temporary total disability compensation for this accident at the rate of $306.58 per week for 8.143 weeks for the period December 6, 1984, through January 31, 1985. This compensation rate was in error, since the Applicant was entitled to the maximum rate of $310.00 per week, thereby resulting in an underpayment of $3.42 per week for 8.143 weeks or a total underpayment of $27.85. Further, pursuant to Section 78 of the Workers' Compensation Act, the Applicant is entitled to interest of 8 percent per annum compounded weekly on the temporary total disability compensation benefits due and owing him for the above-referenced period, which equals an additional award of $1,297.05. With respect to permanent partial impairment for the industrial accident of December 5, 1984, the Applicant is entitled to 12.48 weeks of permanent impairment benefits payable at the statutory maximum of $207.00 per week for a total of $2,583.36, for a 4 percent impairment of the whole person due to that industrial accident. Finally, Jordan School District (self-insured) shall also be liable for 4/25 or 16 percent of the expenses of the surgery of March 14, 1985, and any future medical expenses incurred by Gilbert R. Lamb. Jordan School District shall pay the 16 percent share to the Workers' Compensation Fund.

The Workers' Compensation Fund of Utah shall pay the Applicant 12.48 weeks of permanent partial impairment benefits at the rate of $200.00 per week for a total of $2,496.00, as compensation for a 4 percent permanent partial

impairment resulting from the industrial accident of June 14, 1984. The Workers' Compensation Fund shall also pay 4/25 or 16 percent of the expenses incurred as the result of the surgery of March 14, 1985, and any future medical expenses incurred by Gilbert R. Lamb. Finally, the Workers' Compensation Fund shall also be responsible for 14.04 weeks of permanent partial impairment benefits payable at the statutory maximum of $189.00 per week for a total of $2,653.56, as compensation for a 4.5 percent permanent partial impairment resulting from the industrial accident of August 10, 1982. The Administrative Law Judge is mindful that the Medical Panel divided the injuries equally; however, to effectuate the finding of the Panel that the injury of August 10, 1982, contributed more than the other injuries, and to insure that the full 12.5 percent is awarded, the Administrative Law Judge has attributed this rating to the injury of August 10, 1982. Therefore, the Workers' Compensation Fund shall also be liable for 4.5/25 or 18 percent of the expenses as a result of the surgery of March 14, 1985, and any future medical expenses incurred by Gilbert R. Lamb. Pursuant to Section 69 of the Act, the Workers' Compensation Fund of Utah shall pay the expenses of the surgery of March 14, 1985, and any future medical expenses incurred by Gilbert R. Lamb in full in the first instance, and they shall then be entitled to reimbursement from the Second Injury Fund for 50 percent of those expenses, and they shall also be entitled to reimbursement from Jordan School District (self-insured) for 16 percent of those expenses.

The Second Injury Fund shall pay the Applicant 39 weeks of permanent partial impairment benefits at the rate of $207.00 per week for a total of $8,073.00, as compensation for a 12.5 permanent partial impairment of the whole person due to preexisting conditions.

CONCLUSIONS OF LAW:

Gilbert R. Lamb is entitled to workers' compensation benefits as set forth hereinabove.

ORDER:

IT IS THEREFORE ORDERED that Jordan School District (self-insured) pay Gilbert R. Lamb the sum of $27.85, which amount represents the underpayment of temporary total disability benefits to him as a result of his industrial accident of December 5, 1984.

IT IS FURTHER ORDERED that Jordan School District (self-insured) pay Gilbert R. Lamb compensation at the rate of $310.00 per week for 45.286 weeks for a total of $14,038.66, as compensation for temporary total disability for the period February 1, 1985, through December 14, 1985. The foregoing benefits shall be paid in a lump sum less the attorney's fee to be awarded hereinafter.

IT IS FURTHER ORDERED that Jordan School District (self-insured) pay Michael J. Mazuran, attorney for the Applicant, the sum of $5,226.68 for services rendered in his matter, the same to be deducted from the aforesaid award to the Applicant and remitted directly to his office.

IT IS FURTHER ORDERED that Jordan School District (self-insured) pay Gilbert R. Lamb the sum of $1,297.05, which amount represents 8 percent interest as of August 23, 1986, on the temporary total disability benefits previously awarded to him, the same to be paid in a lump sum.

IT IS FURTHER ORDERED that Jordan School District (self-insured) pay Gilbert R. Lamb compensation at the rate of $207.00 per week for 12.48 weeks for a total of $2,583.36 as compensation for a 4 percent permanent partial impairment resulting from the industrial accident of December 5, 1984. The foregoing benefits shall be paid in a lump sum.

IT IS FURTHER ORDERED that Jordan School District and/or the Workers' Compensation Fund pay Gilbert R. Lamb compensation at the rate of $200.00 per week for 12.48 weeks for a total of $2,496.00, as compensation for a 4 percent permanent partial impairment due to the industrial accident of June 14, 1984. The foregoing shall be paid in a lump sum.

IT IS FURTHER ORDERED that Jordan School District and/or the Workers' Compensation Fund pay Gilbert R. Lamb compensation at the rate of $189.00 per week for 14.04 weeks for a total of $2,653.56, as compensation for a 4.5 percent permanent partial impairment due to the industrial accident of August 10, 1982. The foregoing benefits shall commence effective June 8, 1986, with accrued amounts due and owing in a lump sum.

IT IS FURTHER ORDERED that the Workers' Compensation Fund of Utah pay in full all medical expenses incurred as a result of the surgery of March 14, 1985, and any future medical expenses incurred by Gilbert R. Lamb as a result of his industrial injuries. The Workers' Compensation Fund shall then be entitled to reimbursement from the Second Injury Fund for 50 percent of such expenses paid on behalf of Mr. Lamb, and they shall also be entitled to reimbursement from Jordan School District (self-insured) for 16 percent of said expenses incurred on behalf of the Applicant.

IT IS FURTHER ORDERED that the Administrator of the Second Injury Fund prepare the necessary vouchers directing the State Treasurer to pay Gilbert R. Lamb compensation at the rate of $207.00 per week for 39 weeks or a total of $8,073.00, as compensation for a 12.5 percent permanent partial impairment due to preexisting conditions. The foregoing benefits shall commence effective September 14, 1986.

IT IS FURTHER ORDERED that any Motion for Review of the foregoing shall be filed in writing within fifteen (15) days of the date hereof,

specifying in detail the particular errors and objections, and unless so filed, this Order shall be final and not subject to review or appeal.

Timothy C. Allen
Administrative Law Judge

Passed by the Industrial Commission of Utah, Salt Lake City, Utah, this 20th day of August, 1986.

ATTEST:

/s/ Linda J. Strasburg
Linda J. Strasburg
Commission Secretary

CERTIFICATE OF MAILING

I certify that on August 26, 1986, a copy of the attached Order in the case of Gilbert R. Lamb issued August 26, 1986, was mailed to the following persons at the following addresses, postage paid:

Erie V. Boorman, Administrator
Second Injury Fund
P.O. Box 45580
Salt Lake City, UT 84145-0580

Robert A. Burton, Attorney at Law
600 Boston Building
Salt Lake City, UT 84111

Gilbert R. Lamb
8750 South 700 East
Sandy, UT 84070

Michael J. Mazuran, Attorney at Law
100 Boston Building
Salt Lake City, UT 84111

Elliot K. Morris, Attorney at Law
Workers' Compensation Fund of Utah
P.O. Box 45420
Salt Lake City, UT 84145-0420

Smith Administrators
P.O. Box 6123
Salt Lake City, UT 84106

THE INDUSTRIAL COMMISSION OF UTAH

By DeAnn S. Smith
DeAnn S. Smith

ADDENDUM

ITEM 9

MOTION FOR REVIEW OF WORKERS COMPENSATION FUND

Workers Compensation Fund of Utah

Blaine C. Palmer, Director
Rodney C. Smith, Assistant Director
560 South 300 East
Post Office Box 45420
Salt Lake City, Utah 84145-0420

August 27, 1986

Timothy C. Allen
Administrative Law Judge
Industrial Commission of Utah
160 East 300 South
Salt Lake City, UT 84145-0580

Re: Gilbert Lamb
WCF File Nos: 84-14721 Inj: 06-14-84
82-21176 Inj: 08-10-82
80-39579 Inj: 11-18-80
Empl: Jordan School District

Dear Judge Allen:

We are in receipt of a copy of the Findings of Fact, Conclusions of Law and Order which you have entered in the above referenced matter. Please consider this letter to be the Workers Compensation Fund's Motion For Review of those Findings of Fact, Conclusions of Law and Order.

As you are aware, the cases of Mountain States Steel Co. v. Industrial Commission, 535 P.2d 1249, and Duaine Brown Chevrolet v. Industrial Commission, 29 Utah 2d 478, 511 P.2d 743, stand for the proposition that compensation benefits cannot be apportioned among insurance carriers in multiple accident cases. As you also know, the Utah Supreme Court restricted the application of these two cases by refusing to apply the principles ennunciated in Brown and Mountain States to apportionment of medical benefits. This occurred in United States Fidelity & Guarantee Co. v. Industrial Commission of Utah (Anderton), 657 P.2d 764. However, presumably, Brown and Mountain States Steel are still the law of the State of Utah regarding the apportionment of disability compensation benefits between insurance carriers in multiple accident cases.

I have, on occasion, raised this issue in the context of other cases which have been adjudicated before the Commission in recent months. However, no case has presented such a clear set of facts for the application of Mountain States and Duaine Brown as has this case. Therefore, in discussion with my colleagues here at the Workers Compensation Fund, we have decided to pursue this Motion For Review in order to obtain clarification from either the Commission or the Supreme Court as to when and if the Brown and Mountain States rulings still apply to multiple accident cases.

Another administrative law judge has cited to me David v. Industrial Commission of Utah, 649 P.2d 82 as authority for apportionment of

compensation benefits between carriers in multiple accident cases. However, a careful reading of the David case seems to indicate that what occurred in that matter was not so much an apportionment of compensation as it was an award of permanent partial impairment compensation for two distinct accidents which had independently resulted in their own ratable impairments. This seems to be factually distinguishable from the situation presented in Gilbert Lamb's case and also in the Brown and Mountain States Steel cases where there are a series of accidents which finally result in the need for surgery which thereafter leaves the applicant in an impaired condition. I believe a careful reading of the medical panel report and Findings of Fact in the case at hand will show that there is no factual difference between Gilbert Lamb's situation and those of the applicants in the Mountain States Steel and Duaine Brown cases.

Based on the foregoing, the Workers Compensation Fund hereby moves for a review and/or re-consideration of the Findings of Fact, Conclusions of Law and Order in this matter. Specifically, we would assert, based upon the case authority previously cited, that the permanent partial disability sustained by the applicant through a series of incidents from 1982 through December 5, 1984 should be the responsibility of the insurance carrier or employer at the time of the last accident. Because of the restriction of the application of Brown and Mountain States Steel indicated by the Court in Anderton, the Workers Compensation Fund has no objection to the apportionment of medical expenses as set forth in the Findings of Fact, Conclusions of Law and Order.

I have attached to this letter and Motion For Review copies of the Brown, Mountain States Steel, Anderton, and David cases for your convenience in analyzing our position. We appreciate your consideration of our views in this matter and look forward to receiving the Commission's response.

Very truly yours,

WORKERS COMPENSATION FUND OF UTAH

Elliot K. Morris

Elliot K. Morris
Attorney at Law

EKM/jf

Enclosure

CERTIFICATE OF MAILING

I certify that on August 29, 1986, a copy of the attached letter to Judge T.C. Allen dated 08-27-86 was mailed to the following person(s) at the following address(es):

Erie V. Boorman
Adm. of Second Injury Fund
Industrial Commission of Utah
Salt Lake City, UT 84111

Robert A. Burton
Attorney at Law
600 Boston Building
Salt Lake City, UT 84111

Michael J. Mazuran
Attorney at Law
100 Boston Building
Salt Lake City, UT 84111

Smith Administrators
P.O. Box 6123
Salt Lake City, UT 84106

WORKERS COMPENSATION FUND

By Janet Fushimi

ADDENDUM

ITEM 10

MOTION FOR REVIEW OF JORDAN SCHOOL DISTRICT

008

Robert A. Burton, #516
STRONG & HANNI
Attorneys for Defendant
Jordan School District (self-insured)
Sixth Floor Boston Building
Salt Lake City, Utah 84111
Telephone: (801) 532-7080

IN THE INDUSTRIAL COMMISSION

STATE OF UTAH

GILBERT R. LAMB, Plaintiff, vs. JORDAN SCHOOL DISTRICT, STATE INSURANCE FUND, and SECOND INJURY FUND, Defendants.	MOTION FOR REVIEW OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER Case No. 84-14721-C5

Defendant Jordan School District (self-insured) objects to the Findings of Fact, Conclusions of Law and Order entered by the Industrial Commission on August 20, 1986, and pursuant to 35-1-82.53 Utah Code Annotated, moves the Commission to review, modify and change the foregoing Findings of Fact, Conclusions of Law and Order.

Specifically, the Findings, Conclusions and Order should be modified to reflect that the Jordan School District (self-insured) is only obligated to ultimately bear the cost of 16% of the temporary total disability awarded to Gilbert R. Lamb, interest on that 16%, and 16% of the total attorneys' fee award. The Jordan School District should be reimbursed for any amounts

it has paid in excess of this percentage by the Second Injury Fund and the Workers' Compensation Fund. It is submitted that it was error for the Industrial Commission to order the Jordan School District (self-insured) to assume full responsibility for the temporary total disability payments, attorneys' fees of $5,226.68, and interest of $1,297.05, without a right of reimbursement.

The bases for this motion are discussed in detail in the accompanying Memorandum in Support of Motion to Review.

Dated this 3 day of September, 1986.

STRONG & HANNI

Robert A. Burton
Attorneys for Defendant Jordan
School District (self-insured)

CERTIFICATE OF MAILING

I hereby certify that on this 3rd day of September, 1986, a true and correct copy of the foregoing Motion for Review of Findings of Fact, Conclusions of Law and Order was mailed, postage prepaid, to:

Erie V. Boorman, Administrator
Second Injury Fund
P. O. Box 45580
Salt Lake City, Utah 84145-0580

Gilbert R. Lamb
8750 South 700 East
Sandy, Utah 84070

Michael J. Mazuran
Attorney at Law
LARSEN, MAZURAN & VERHAAREN
100 Boston Building
9 Exchange Place
Salt Lake City, Utah 84111

Elliott K. Morris
Attorney at Law
Workers' Compensation Fund of Utah
P. O. Box 45420
Salt Lake City, Utah 84145-0420

Smith Administrators
P. O. Box 6123
Salt Lake City, Utah 84106

Patsy Wyatt

ADDENDUM

ITEM 11

DENIAL OF WORKERS COMPENSATION FUND MOTION FOR REVIEW

AND

GRANTING OF JORDAN SCHOOL DISTRICT MOTION FOR REVIEW

INDUSTRIAL COMMISSION OF UTAH

CASE No.

GILBERT R. LAMB,

Applicant,

vs.

JORDAN SCHOOL DISTRICT (SELF-INSURED) and/or WORKERS' COMPENSATION FUND (FORMERLY STATE INSURANCE FUND) and/or SECOND INJURY FUND,

Defendants.

ORDER DENYING

WORKERS' COMPENSATION FUND

MOTION FOR REVIEW

AND

GRANTING JORDON SCHOOL DISTRICT

MOTION FOR REVIEW

On August 20, 1986, an Administrative Law Judge of the Commission issued Findings of Fact, Conclusions of Law and an Order awarding the Applicant in the above captioned case temporary total compensation, permanent partial impairment benefits, and medicals related to three separate industrial accidents in which the Applicant was injured while employed with Jordan School District. The Applicant had been voluntarily paid by the defendants some temporary total compensation and medicals for two of the three injuries involved. No permanent partial impairment benefits had been paid and no medical benefits or temporary total compensation for a surgery the Applicant had in March 1985, had been paid. Pursuant to the August 20, 1986 Order, the Applicant was awarded permanent partial impairment benefits and the Administrative Law Judge apportioned the permanent partial impairment benefits between the Second Injury Fund, the Workers' Compensation Fund, and the self-Insured employer due to the findings of the medical panel with respect to the underlying causes of the permanent partial impairment. Similarly, the Administrative Law Judge awarded medical expenses related to the March 1985 surgery and apportioned the expenses between the Second Injury Fund, the Workers' Compensation Fund and the Self-Insured employer per the medical panel findings regarding the causes of the 1985 surgery. Finally, the Administrative Law Judge ordered temporary total compensation benefits for the period of recovery from the 1985 surgery. However, the Administrative Law Judge found this temporary total compensation was the responsibility of the self-insured employer alone, and no contribution from the the Second Injury Fund or the Workers' Compensation Fund was ordered.

On August 29, 1986, the Workers' Compensation Fund filed a Motion for Review with the Commission arguing that the Administrative Law Judge had no statutory authority to apportion compensation between the Workers' Compensation Fund and the self-insured employer. The Workers' Compensation Fund cites Mountain States Steel Company v. Industrial Commission, 535 P.2d 1249 (Utah 1975) and Duaine Brown Chevrolet Company v. Industrial Commission, 511 P.2d 743 (Utah 1973) as authority for the proposition that apportionment of compensation between different carriers/employers cannot be

made in multiple accident cases. The Workers' Compensation Fund argues that these two cases stand for the proposition that it is the carrier/employer at the time of the last accident leading up to permanent impairment that is responsible for all impairment that results, regardless whether contribution from previous compensable industrial accidents can be established. The Workers' Compensation Fund acknowledges the Industrial Commission's authority to apportion medical expenses as established by the case United States Fidelity and Guaranty vs. The Industrial Commission (Anderton), 657 P.2d 764 (Utah 1983), but argues that apportionment of compensation between carriers/employers is still disallowed. The Workers' Compensation Fund asserts that the case David vs. Industrial Commission, 649 P.2d 82 (Utah 1982) disallows apportionment of compensation except in cases where the impairments resulting from the multiple accidents are unrelated to each other. The Workers' Compensation Fund concludes that the self-insured employer in the instant case (the responsible defendant at the date of the most recent accident leading to impairment) should be held responsible for all the impairment with no contribution from the Workers' Compensation Fund as ordered by the Administrative Law Judge.

On September 3, 1986, Jordan School District (the self-insured employer in the instant case) filed a Motion for Review contesting the Administrative Law Judge's finding that Jordan School District was responsible for all the temporary total compensation associated with the recovery period for the 1985 surgery. Jordan School District suggests that U.C.A. 35-1-69 requires the Second Injury Fund or the Workers' Compensation Fund to pick up that portion of the temporary total compensation that was not the responsibility of the employer. Jordan School District contends that since it was determined that Jordan School District was responsible for only 16% of the medical expenses related to the 1985 surgery, that likewise Jordan School District should be responsible for only 16% of the temporary total compensation associated with the recovery period for the surgery. Jordan School District contends that the Second Injury Fund or the Workers' Compensation Fund is responsible for the remaining 84% of the temporary total compensation. On September 8, 1986, Jordan School District also filed a response to the Workers' Compensation Fund's August 29, 1986, Motion for Review. In that response, Jordan School District contends that the David case establishes Industrial Commission authority to apportion compensation between several carriers/employers in multiple accident cases, and thus, the Administrative Law Judge should be affirmed in his apportionment of the medical expenses and permanent partial impairment benefits.

Addressing first the issue of apportionment between carriers/employers, the Commission finds that the Mountain States Steel case and the Duaine Brown Chevrolet case appear to disallow apportionment of compensation. However, the Commission finds that the more recent David case does allow apportionment of compensation where several different injuries/accidents are dealt with in one hearing and/or one order. That case does not specify the parameters delineating when apportionment will or will not be appropriate. Because the Court did not specify parameters in the David case, the Commission must decide whether apportionment of compensation between the Workers' Compensation Fund and Jordan School District is appropriate in

this case. Because this case involves three injuries/accidents which are being adjudicated for the first time, and which involve viable claims not barred by the Statute of Limitations, the Commission finds the Administrative Law Judge appropriately dealt with each injury separately and ordered benefits on each of the three injuries according to the medical panel's findings on causation. Therefore, the Commission must deny the Workers' Compensation Fund's Motion for Review with respect to the Administrative Law Judge's apportionment of compensation.

Regarding the non-apportionment of temporary total compensation, the Commission must reverse the Administrative Law Judge and grant Jordan School District's Motion for Review. The Commission finds it inconsistent to apportion the medical expenses related to the 1985 surgery and not apportion the temporary total compensation related to the recovery period for that surgery. The medical panel is clear that the need for surgery was the result of all three accidents and pre-existing conditions. If the need for surgery was the result of all three accidents and pre-existing conditions, then presumably the period of recovery for that surgery also resulted from all three accidents and pre-existing conditions. The Commission can find nothing in the medical panel report that contradicts this conclusion. Therefore, the Commission finds the temporary total compensation following the March 1985 surgery, and the interest awarded thereon, should be apportioned in the same manner as was the medical expenses related to the surgery. The temporary total compensation and interest is a total of $15,335.71. Jordan School District is responsible for 16% or $2,453.71. The Workers' Compensation Fund is responsible for 34% or $5,214.14. The Second Injury Fund is responsible for 50% or $7,667.86 of which $2,441.18 should be paid to the Applicant and $5,226.68 to the Applicant's attorney. Referring to the Administrative Law Judge's August 20, 1986, Order, of the ten paragraphs in that Order, only paragraphs 2, 3 and 4 are amended by this Order. Those three paragraphs should be replaced by the paragraph to follow:

> IT IS FURTHER ORDERED that the Applicant is entitled to 45.286 weeks of temporary total compensation or a total of $14,038.66 as compensation for temporary total disability for the period of February 1, 1985, through December 14, 1985. The Applicant is also entitled to $1,297.05 in interest on these temporary total benefits. The temporary total compensation and interest are due in a lump sum and should be paid as follows. Jordan School District shall pay the Applicant $2,453.71. The Workers' Compensation Fund shall pay the Applicant $5,214.14. The Second Injury Fund shall pay the Applicant $2,441.18 and shall pay the attorney for the Applicant, Michael J. Mazuran, $5,226.68 for services rendered in this matter.

IT IS FURTHER ORDERED that all parts of the Administrative Law Judge's August 20, 1986, Order in this matter not specifically amended herein, remain in effect and are final.

Stephen M. Hadley
Chairman

Walter T. Axelgard
Commissioner

Lenice Nielsen
Commissioner

Passed by the Industrial Commission of Utah, Salt Lake City, Utah, this 23rd day of October, 1986

ATTEST:

Linda J. Strasburg
Commission Secretary

CERTIFICATE OF MAILING

I certify that on October 23, 1986 a copy of the attached Order Denying Workers' Compensation Fund's Motion for Review and Granting Jordan School District's Motion for Review was mailed to the following persons at the following addresses, postage paid:

Workers' Compensation Fund

Erie V. Boorman, Administrator, Second Injury Fund

Robert A. Burton, Attorney, 600 Boston Bldg., Salt Lake City, Utah 84111

Gilbert R. Lamb, 8750 South 700 East, Sandy, Utah 84070

Michael Mazuran, Attorney, 100 Boston Bldg., Salt Lake City, Utah 84111

Smith Administrators, P.O. Box 6123, Salt Lake City, Utah 84106

INDUSTRIAL COMMISSION OF UTAH

By Barbara

ADDENDUM

ITEM 12

INDUSTRIAL COMMISSION MAXIMUM COMPENSATION RATE SCHEDULE

	TEMPORARY TOTAL			PERMANENT PARTIAL			PERMANENT TOTAL			DEATH	TOTAL
Eff. Date	Min.	*	Maximum	Min.	*	Maximum	Min.	*	Maximum	Death**	6 Years
*** 7/1/1972	29	5	54.00+	29	5	54.00+	29	5	54.00+	54.00+	24,648.00
7/1/1973	35	5	89.33	35	5	89.33	35	5	89.33	89.33	27,870.96
7/1/1974	35	5	95.33	35	5	95.33	35	5	95.33	95.33	29,742.96
7/1/1975	45	5	155.00	45	5	103.33	45	5	131.75	131.75	41,106.00
7/1/1976	45	5	169.00	45	5	112.67	45	5	143.65	143.65	44,818.00
7/1/1977	45	5	183.00	45	5	122.00	45	5	156.00	156.00	48,672.00
7/1/1978	45	5	197.00	45	5	131.00	45	5	167.00	167.00	52,104.00
7/1/1979	45	5	210.00	45	5	140.00	45	5	179.00	179.00	55,848.00
7/1/1980	45	5	230.00	45	5	153.00	45	5	196.00	196.00	61,152.00
7/1/1981	45	5	256.00	45	5	171.00	45	5	218.00	218.00	68,016.00
7/1/1982	45	5	284.00	45	5.	189.00	45	5	241.00	241.00	75,192.00
7/1/1983	45	5	300.00	45	5	200.00	45	5	255.00	255.00	79,560.00
7/1/1984	45	5	310.00	45	5	207.00	45	5	264.00	264.00	82,368.00
7/1/1985	45	5	323.00	45	5	215.00	45	5	275.00	275.00	85,800.00
7/1/1986	45	5	329.00	45	5	219.00	45	5	280.00	280.00	87,360.00

* = Dependent's Allowance (In years with plus added to maximum. Now limited to spouse and 4 minor dependent children

** = Only maximum shown. Figured as are other benefits.

*** = As of this date, benefits not to exceed wage.

Burial Benefit $1,800.00

No Dependent Death Payment to Second Injury Fund or Default Indemnity Fund = $30,000.